Supreme Court, U.S.
FILED
MAR 24 1999
OFFICE OF THE CLERK

No. 98-1242

In The

Supreme Court of the United States

October Term, 1998

MULL & MULL, PLC,

Petitioner,

v.

RHONE-POULENC RORER, INC.;
BAXTER HEALTHCARE COMPANY;
ALPHA THERAPEUTIC CORPORATION; and
BAYER CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF

MACK E. BARHAM
ROBERT E. ARCENEAUX*
MICHAEL W. HILL
BARHAM & ARCENEAUX, PLC
650 Poydras Street, Suite 2700
New Orleans, LA 70130-6161
Telephone: (504) 525-4400

Attorneys For Petitioner, Mull & Mull

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

488

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

1. The Opposition's contention that the Fractionators were "bushwhacked" is false. It is true that Mull and Mull did not file an opposition to the settlement, because it could not do so and honor its ethical duties to the three hundred and fifty of its clients that wanted the settlement. One attorney – James Carney – did file an opposition raising the probable illegality of the settlement, to which the Fractionators responded by asserting the opposition was a breach of his ethical duties. See Cert. Petition at 28. After the settlement was approved, more than 20 "class" members appealed, asserting that the settlement was prohibited by *Amchem*. Their appeals were settled in exchange for the Fractionators' decision to allow them to exit the class. On August 15, 1997, Mull and Mull gave notice of its assertion of a lien, based on its view that *Amchem* and the Release had transformed the "class" action into an amalgamated collection of individual settlements. See Cert. Petition, at 9. Only thereafter, on August 29, 1997, did the Fractionators finally and irrevocably commit themselves to going forward. It was on that date that they funded the Metropolitan Life Irrevocable Trust, in a trust agreement that expressly stated that it was not created pursuant to or in furtherance of any court order or judgment – a statement that was candidly honest in light of the Release's disavowal of the "class action" fairness finding. *See id.* at 9-10. And, while Mull and Mull's lien rights were being litigated, the Fractionators "voluntarily" agreed to continue to pay clients, even though they were relieved from the legal obligation to do so by Court judgment, with the end result that the 6000

claims were all settled and paid after this attorney fee dispute erupted. In fact, most of those claims were hurriedly processed and paid while this fee dispute was pending on appeal, after the Fractionators decided to expedite the payment process by waiving many of the procedural requirements they had previously imposed, such as the opening of estates. Given this history, the Fractionators' contention is absurd, if not insulting to the intelligence of this Court. This "class" action was a calculated gamble from start to finish. When *Amchem* was handed down, the Fractionators must have decided to go forward, because the benefit they hoped to receive justified the risk. For the most part, the Fractionators have gotten what they paid for – 6000 claims were resolved for the relatively cheap price of $100,000 per claim, even though some of those claims undoubtedly possessed more merits than others.[1] The Fractionators' feigned righteous indignation is persuasive argument, but it masks the careful risk benefit considerations that went into their settlement strategy, from achieving litigation

---

[1] The benefit achieved by the Fractionators is underscored by events of last week. In Louisiana, an Orleans Parish Civil District Court jury awarded the surviving parents of a deceased hemophiliac $35,300,000 in compensatory survival and wrongful death damages for the loss of their son and his pain and suffering prior to death. Not only did the jury find that the Fractionators were liable on the grounds of strict products liability and negligence, but it also found that two of them (Cutter and Alpha) were guilty of fraud. The district judge subsequently dismissed the case on the ground of statute of limitations, which decision will be appealed. But, the clear message delivered by the jury regarding the merits speaks volumes about the payoff realized by the Fractionators through their $100,000 settlements.

class decertification in *Wadleigh* to sponsoring and administering a settlement-only class in the face of *Amchem*.

2. In an obvious attempt to scare this Court away from this case, the Opposition argues that the issue at hand is whether the settlement of over 6000 "class" members is "void," a conclusion that the Fractionators assert is not worth reaching because it is raised only for the benefit of lawyers. However, protecting the lawyers' state created and protected property rights will not cause the sky to fall. Whether the settlements individually confected by the "class" members are "void" is not an issue before this Court, and cannot be an issue insofar as it relates to those persons who signed the Release. See Release, paragraph 14, at App. 101. What is at issue in this case is whether the Fractionators are entitled to have the Petitioners enjoined from pursuing state court litigation to enforce their attorneys fees liens. The injunction that prevents this result seeks to enforce a federal judgment that could never have been issued but for the false and fraudulent "class action" petition filed by the Fractionators and the Steering Committee in order to invoke nationwide federal jurisdiction where it was clearly lacking, but was nonetheless necessary to the success of a plan to use a "class action" to cap liability for fees and shift the limited fees from "hometown" lawyers to Steering Committee members. The Fractionators admitted that the purpose of the "class action" charade was to arm the Court with the putative power to implement the "attorney fee" portion of the settlement. See Cert. Petition at 5. In addition to the lawyers – the admitted target of the "class action" plan – reversal of the injunction would also benefit "class" members who have not signed the Release

– persons who have not yet been paid. However, as to those persons who have signed and received their checks – over 6000 in number – nothing that occurs as a result of the instant dispute affects their rights, unless and until the Fractionators sue them to undo the settlement effected by the Release. If they do, the warranty clause of the Release which states that it is being concluded as an "individual" settlement, unrelated to the "class action," will protect their rights.

Respectfully submitted,

MACK E. BARHAM
ROBERT E. ARCENEAUX*
MICHAEL W. HILL
BARHAM & ARCENEAUX, PLC
650 Poydras Street, Suite 2700
New Orleans, LA 70130-6161
Telephone: (504) 525-4400

Attorneys For Petitioner, Mull & Mull

* *Counsel of Record*